

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 ARTHUR BERAHА,

3:17-cv-00366-RCJ-CBC

5 Plaintiff,

6 v.

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REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

8 STATE OF NEVADA, et al.,

9 Defendants.

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 11 This case involves a civil rights action filed by Plaintiff Arthur Beraha ("Beraha")
 12 against Defendants James Dzurenda, William Reubart, William Gittere, Inmate Calling
 13 Solutions, LLC ("ICS"), CenturyLink doing business as Embarq Payphone Services, Inc.
 14 ("CenturyLink"), Renee Baker, and John Does (collectively referred to as "Defendants").
 15 Currently pending before the Court are a motion to dismiss filed by Defendant
 16 CenturyLink, (ECF No. 43), and a motion to dismiss filed by Defendant ICS. (ECF No.
 17 64.) Beraha opposed the motions, (ECF Nos. 58, 66), and CenturyLink and ICS replied.
 18 (ECF Nos. 60, 67.) Having thoroughly reviewed the record and papers, the Court hereby
 19 recommends CenturyLink and ICS' motions to dismiss be granted.

20 **I. BACKGROUND AND PROCEDURAL HISTORY**21 **A. Procedural History**

22 Beraha is an inmate in the custody of the Nevada Department of Corrections
 23 ("NDOC"), and is currently housed at Ely State Prison ("ESP") in Ely, Nevada. (ECF No.
 24 10.) Proceeding *pro se*, Beraha filed the instant civil rights action pursuant to 42 U.S.C.
 25 § 1983 alleging various claims against Defendants. (*Id.*)

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 27 ¹ This Report and Recommendation is made to the Honorable Robert C. Jones,
 28 United States District Judge. The action was referred to the undersigned Magistrate
 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

Pursuant to 28 U.S.C. § 1915A(a), the Court screened Beraha's amended complaint on June 15, 2018. (ECF No. 12.) Subsequently Beraha filed a motion for partial reconsideration (ECF No. 13), which the Court granted. (ECF No. 15.) The Court determined the following claims stated a cause of action: (1) Count I alleging due process claims for property violations and statutory authority against Defendant Dzurenda; (2) Count II alleging free exercise, Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and equal protection violations against Defendants Dzurnda, Gittere, and Reubart²; (3) the portions of Count III alleging federal telecommunications violations against Defendants CenturyLink and ICS; (4) the portions of Count III alleging state law violations of Nevada's Deceptive Trade Practices Act and Nevada's Revised Statute ("NRS") §§ 41.130 and 41.600 against Defendants CenturyLink and ICS; and, (5) Count IV alleging free exercise, RLUIPA, and equal protection violations against Defendants Dzurenda, Gittere, Reubart and Baker. (*Id.*; see also ECF No. 12.)³

B. Facts Related to Count III

Between February 12, 2008, and December 31, 2016, CenturyLink was the principal party to a contract with the NDOC to provide inmate telephone services ("ITS") and systems at NDOC facilities. (ECF No. 10 at 9.) ICS was a subcontractor or agent of CenturyLink "whose responsibilities included, but were not limited to, providing the ITS system, technical support, maintenance and, point of sale . . . billing. (*Id.*)

Under NDOC's contract with CenturyLink, the ITS rate structure for intrastate calls was, upon call acceptance, a flat \$1.65 surcharge plus thirteen (13) cents per minute after that. (*Id.* at 11.) Beraha does not challenge the rate structure, rather he alleges during this time, ICS's automated voice system represented calls were limited to fifteen minutes. (*Id.*) However, on five different occasions, CenturyLink or ICS's network

² Defendants Gittere and Reubart were later substituted into the case in place of Tim Filson and Harold Bryne. (ECF No. 42.)

³ The only count at issue in the present motions is Count III. Thus, the Court will only discuss those facts relevant to Count III herein.

1 disconnected Beraha's phone call after six, three, one, and ten minutes. (*Id.* at 11-12.)
 2 Of these five phone calls, four were made intrastate and one was made interstate. (*Id.*)

3 Multiple inmates submitted inquiries regarding dropped calls during this time,
 4 raising the possibility calls were being intentionally dropped. (*Id.* at 12-13.) In response
 5 to the inquiries, NDOC officials contacted CenturyLink and/or ICS, whc stated the calls
 6 were dropped for nonsecurity and nontechnical reasons. (*Id.* at 13.) Beraha alleges
 7 CenturyLink and ICS "failed to disclose, concealed, and suppressed a material fact from
 8 [Beraha] and other inmates, namely, that phone calls . . . would be intentionally and
 9 unnecessarily dropped for issues unrelated to security or technical concerns" prior to the
 10 fifteen-minute limit. (*Id.*) Furthermore, Beraha alleges CenturyLink and ICS improperly
 11 charged Beraha and other inmates for completed calls even when the calls were
 12 dropped early. (*Id.* at 14, 17.)

13 **C. Defendants' Motions to Dismiss**

14 On November 20, 2018, CenturyLink filed a motion to dismiss. (ECF No. 43.)
 15 Subsequently, on January 1, 2019, ICS filed a motion to dismiss.⁴ (ECF No. 64.) In the
 16 motions, CenturyLink and ICS argue: (1) the amended complaint fails to state a claim
 17 regarding alleged violations of the Telecommunications Act ("the Act"), because Beraha
 18 has not alleged facts that can be adjudicated under the Act as it only applies to interstate
 19 calls, not intrastate, and the FCC has not ruled on the practice of dropping calls outside
 20 of the rate structure, which he does not challenge; (2) the amended complaint fails to
 21 state a claim as to the remaining claims, because he has not pled facts supporting the
 22 allegations, providing only a conclusory list; (3) this Court lacks jurisdiction over the
 23 primary claim related to an alleged violation of the Federal Communications Act,
 24 because Beraha failed to seek and obtain the required FCC review prior to initiating suit;

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⁴ The motions make identical arguments and, in turn, Beraha's responses also make identical arguments. Therefore, the Court addresses the two motions to dismiss together.

1 and, (4) Beraha is barred from representing other prisoners or a class of prisoners.
 2 (ECF Nos. 43 at 3-11; 64 at 3-10.)

3 In response, Beraha filed an opposition arguing dismissal of CenturyLink and ICS
 4 is inappropriate because: (1) both per call charges and the associated practice of
 5 dropped calls that incur per call charges were declared unjust and unreasonable by the
 6 FCC in their 2013 and 2015 Orders, thus Beraha did not need to seek the FCC's opinion
 7 before filing suit; (2) this Court does not have the subject matter jurisdiction to review or
 8 invalidate FCC orders as that is solely the prerogative of the Ninth Circuit Court of
 9 Appeals; (3) it does not matter the calls were made before the 2015 FCC Order because
 10 Beraha separately relies on the 2013 FCC Interim Order; (4) numerous dropped calls
 11 amongst inmates were identified in the FAC, therefore allowing the inference
 12 CenturyLink and ICS engaged in a discrete practice of dropping calls from 2012-2016;
 13 (5) primary jurisdiction is inapplicable since the FCC already ruled the practice of
 14 dropping calls is unjust and unreasonable; and, (6) Count III sets forth sufficient facts or
 15 legal elements for relief. (ECF Nos. 58 at 7-21; 66 at 5-10.)

16 In reply, CenturyLink and ICS reiterate their prior arguments. In addition, they
 17 argue: (1) Beraha misconstrues 47 U.S.C. § 276(b)'s application to the facts of this case,
 18 because it does not broaden the FCC's authority to regulate intrastate calls, a fact
 19 pronounced by the FCC itself; (2) the 2013 and 2015 FCC Orders do not relate to
 20 Beraha's allegations because those proposed rules only apply to rates imposed by
 21 carriers on interstate calls made after the 2015 Order went into effect, and neither
 22 proposed rule opines on the practice of dropping calls; (3) the fraudulent
 23 misrepresentation claim fails to allege CenturyLink engaged in the allegedly fraudulent
 24 conduct; (4) the deceptive trade practices claim fails to allege sufficient underlying
 25 wrongful conduct; (5) the unjust enrichment claim fails to allege that CenturyLink was
 26 paid a fee or that they retained the benefit of that payment; and, (6) if the Court
 27 dismisses the Act claim, the state law claims should be dismissed for lack of original
 28 jurisdiction. (ECF Nos. 60 at 2-10; 67 at 2-7.)

1 **II. LEGAL STANDARD**

2 Dismissal of a complaint for failure to state a claim upon which relief may be
 3 granted is provided for in Federal Rule of Civil Procedure 12(b)(6). The ruling is a
 4 question of law. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983).
 5 The court is to grant dismissal when the complaint fails to "state a claim for relief that is
 6 plausible on its face[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), or fails to
 7 articulate a cognizable legal theory, *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015).
 8 When analyzing a motion under Rule 12(b)(6), courts accept as true all well-pled factual
 9 allegations, set aside legal conclusions, and verify the complaint states a plausible claim
 10 for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). While detailed factual allegations
 11 are not necessary, the complaint must offer more than "a formulaic recitation of the
 12 elements of a cause of action," *Twombly*, 550 U.S. at 555, and include sufficient facts "to
 13 give fair notice and to enable the opposing party to defend itself effectively," *Starr v.*
 14 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). In conducting the dismissal analysis, the
 15 complaint is construed in a light most favorable to the plaintiff. *Chubb Custom Ins. Co. v.*
 16 *Space Sys./Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). Moreover, the court takes
 17 particular care when reviewing the pleadings of a *pro se* party, for a more forgiving
 18 standard applies to litigants not represented by counsel. *Hebbe v. Pilier*, 627 F.3d 338,
 19 341-42 (9th Cir. 2010).

20 **III. DISCUSSION**

21 **A. Telecommunications Act Claims**

22 **1. FCC Determination Regarding the Practice of Dropping Calls**

23 On September 26, 2013, the FCC released a "Report and Order and Further
 24 Notice of Proposed Rulemaking," ("2013 Order"). 28 FCC Rcd. 14107 (2013). In the
 25 2013 Order, the FCC adopted interim safe harbor rates and an interim hard cap on ICS
 26 providers' rates for interstate calls, citing "its plenary authority over interstate calls under
 27 § 201(b) and its mandate to ensure that providers are 'fairly compensated' under §
 28 276." See *Global Tel*Link v. FCC*, 866 F.3d 397, 405 (D.C. Cir. 2017). The FCC

1 further addressed the interim rate structure regarding “per-call charges that may be
 2 unjust, unreasonable, and unfair because callers are often charged more than one per-
 3 call charge for a single conversation when calls are dropped . . .” 28 FCC Rcd. 14107,
 4 14154-14156. The FCC determined unnecessarily dropped calls that incur multiple per-
 5 call charges are not just and reasonable. *Id.* However, this finding was expressly
 6 limited to the rate structure rather than the practice of dropping calls itself. *Id.*

7 On November 5, 2015, the FCC released a “Second Report and Order and Third
 8 Further Notice of Proposed Rulemaking” (“2015 Order”). 30 FCC Rcd. 12763 (2015).
 9 In the 2015 Order, the FCC adopted rate caps that apply to all interstate and intrastate
 10 ICS and excluded site commission costs from the rate caps. *Id.* at 12775-76, 12818-62.
 11 Here, too, the FCC addressed dropped calls exclusively within the context of rate
 12 structures rather than the practice of dropping calls. *Id.* at 12810-13.

13 Beraha explicitly states “[he] does not challenge the filed rate structure.” (ECF
 14 No. 10 at 11, ¶ 5.) Rather, he challenges the practice of dropping calls itself. (*Id.* at 14-
 15 17.) Currently, there is no FCC determination on the practice of dropping calls outside
 16 of the rate structure. Thus, Beraha is not entitled to rely on either the 2013 or the 2015
 17 Orders and was required to seek an FCC determination before initiating suit.

18 **2. The Court’s Jurisdiction Over Federal Communications
 19 Act Violations**

20 Title 47 U.S.C. § 201(b) of the Federal Communications Act (“FCA”), provides
 21 “[a]ll charges, practices, classifications, and regulations for and in connection with such
 22 communication service, shall be just and reasonable, and any such charge, practice,
 23 classification, or regulation that is unjust and unreasonable is declared to be unlawful.”
 24 Beraha’s theories of liability appear to be that 47 U.S.C. § 207 provides him with a
 25 private right of action for damages resulting from CenturyLink and ICS’ alleged
 26 violations of § 201(b). Section 207 provides, “[a]ny person claiming to be damaged by
 27 any common carrier subject to the provisions of this chapter may either make complaint
 28 to the [Federal Communications] Commission, or may bring suit for the recovery of the

1 damages for which such common carrier may be liable under the provisions of this
 2 chapter, in any district court of the United States of competent jurisdiction; but such
 3 person shall not have the right to pursue both such remedies."

4 However, a prerequisite to filing suit for a violation of § 201(b) is that a
 5 determination must have been made by the FCC that the practice in question is unjust
 6 or unreasonable. The Ninth Circuit has held the FCC first has to make such a
 7 determination before courts can find a violation of § 201(b). *North Cnty. Comm'n Corp.*
 8 v. *Cal. Catalog & Tech.*, 594 F.3d 1149, 1158 (9th Cir. 2010). “[I]t is within the
 9 Commission's purview to determine whether a particular practice constitutes a violation
 10 for which there is a private right of compensation. *Id.* at 1160; see also *Metrophones*
 11 *Telecomm. V. Global Crossing Telecomm.*, 423 F.3d 1056, 1065 (9th Cir. 2005);
 12 *Higdon v. Pac. Bell Tel. Co.*, No. C 08-03526, 2010 U.S. Dist. LEXIS 40300, 2010 WL
 13 1337712, at *1 (N.D. Cal., Apr. 2, 2010) (dismissing § 201(b) claim because the FCC
 14 had not made a determination whether the challenged practice was unjust or
 15 unreasonable).

16 Here, there is no indication that Beraha has sought a determination from the FCC
 17 regarding the unfairness or unreasonableness of CenturyLink or ICS's alleged wrongful
 18 conduct. Additionally, as discussed above, there is no current FCC determination
 19 regarding whether the practice of dropping calls outside of the rate structure is unjust
 20 and unreasonable. Therefore, the Court cannot find a violation of § 201(b) and
 21 recommends these claims be dismissed with prejudice. *North Cnty. Comm'n Corp.*, 594
 22 F.3d at 1158.⁵

23 **B. Remaining Claims**

24 The Court has supplemental jurisdiction over state-law “claims that are so related
 25 to claims in the action within [the Court’s] original jurisdiction that they form part of the
 26 same case or controversy . . .” 28 U.S.C. § 1337(a). However, a federal court may

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 28 ⁵ Since Beraha has failed to meet this threshold requirement, the Court will not
 address the remaining arguments regarding the Telecommunications Act claims.

1 decline to exercise supplemental jurisdiction over a claim if: "(1) the claim raises a novel
 2 or complex issue of State law, (2) the claim substantially predominates over the claim or
 3 claims over which the district court has original jurisdiction, (3) the district court has
 4 dismissed all claims over which it has original jurisdiction, or (4) in exceptional
 5 circumstances, there are other compelling reasons for declining jurisdiction." *Id.* at §
 6 1337(c)(1)-(4).

7 If the Court determines one or more of these conditions exists, it must then
 8 consider whether exercising jurisdiction would ultimately serve "the principles of judicial
 9 economy, procedural convenience, fairness to litigants, and comity . . ." *Carnegie-*
 10 *Mellon University v. Cohill*, 484 U.S. 343, 350 (1988); see also *United Mine Workers of*
 11 *America v. Gibbs*, 383 U.S. 715, 726 (1966). When the balance of these factors
 12 indicates a case properly belongs in state court, as when the federal law claims have
 13 dropped out of the lawsuit in its early stages and only state law claims remain, the
 14 federal court should decline the exercise of jurisdiction by dismissing the case without
 15 prejudice. *Carnegie-Mellon University*, 484 U.S. at 350 (internal citation omitted). In
 16 the usual case in which all federal law claims are eliminated before trial, the balance of
 17 factors to be considered will point toward declining to exercise jurisdiction over the
 18 remaining state law claims. *Id.* at 350 n. 7.

19 The only claims remaining against CenturyLink and ICS are state law claims
 20 alleging violations of Nevada's Deceptive Trade Practices Act and NRS §§ 41.130 and
 21 41.600. (ECF No. 10.) Having found that no federal claim against CenturyLink and ICS
 22 can proceed, this Court no longer has a claim to which it has original jurisdiction.
 23 Beraha does not object to CenturyLink or ICS's arguments that the Court need not
 24 exercise supplemental jurisdiction, instead solely arguing his state law claims state
 25 sufficient facts to survive rule 12(b) scrutiny. (ECF No. 58.) Thus, this Court
 26 recommends supplemental jurisdiction be denied as it pertains to Beraha's state law
 27 claims.

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1 **IV. OTHER PENDING MOTIONS**

2 In light of this Report and Recommendation dismissing all of Eeraha's claims
3 against CenturyLink and ICS, CenturyLink's motion to sever (ECF No. 44) is moot, and
4 the Court recommends it be denied on that basis.

5 **V. CONCLUSION**

6 Based upon the foregoing, the Court recommends CenturyLink (ECF No. 43) and
7 ICS's (ECF No. 64) motions to dismiss be granted. The parties are advised:

8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
9 Practice, the parties may file specific written objections to this Report and
10 Recommendation within fourteen days of receipt. These objections should be entitled
11 "Objections to Magistrate Judge's Report and Recommendation" and should be
12 accompanied by points and authorities for consideration by the District Court.

13 2. This Report and Recommendation is not an appealable order and any
14 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
15 District Court's judgment.

16 **VI. RECOMMENDATION**

17 **IT IS THEREFORE RECOMMENDED** that Defendant CenturyLink's motion to
18 dismiss (ECF No. 43) be **GRANTED** as follows: Count III be **DISMISSED** with prejudice
19 as to Plaintiff's Telecommunications Act claim; Count III be **DISMISSED** with prejudice
20 as to Plaintiff's state tort claims;

21 **IT IS THEREFORE RECOMMENDED** that Defendant ICS's motion to dismiss
22 (ECF No. 64) be **GRANTED** as follows: Count III be **DISMISSED** with prejudice as to
23 Plaintiff's Telecommunications Act claim; Count III be **DISMISSED** with prejudice as to
24 Plaintiff's state tort claims;

25 **IT IS FURTHER RECOMMENDED** that Defendant CenturyLink's motion to sever
26 (ECF No. 44) be **DISMISSED** as moot; and

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1 **IT IS FURTHER RECOMMENDED that the Clerk ENTER JUDGMENT as to**
2 **Defendants CenturyLink and ICS.**

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4 **DATED:** 5/8/2019

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7 **UNITED STATES MAGISTRATE JUDGE**

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